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No. 94-

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

THE LIVING WILL CENTER, a limited liability company, and MERRILL G. HASTINGS, JR.
Petitioners,

v.

NBC SUBSIDIARY (KCNC-TV), INC. and SUZANNE McCARROLL,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Colorado

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether statements broadcast during an investigative television news report on a regularly scheduled news program that a private business is "a scam" and that the customers of the business are being "taken . . . totally taken" contain, or imply, a verifiable fact, or can reasonably be understood as assertions of fact about the conduct of the business, so that the statements or implications are not protected against a libel claim by the First Amendment to the United States Constitution under the "verifiability test" announced by this Court in Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990).

2. Whether a court must take into account the broad social context of a defamatory statement (i.e, whether a statement occurs in a "hard news" format as opposed to an opinion forum such as a critic's review or editorial commentary), when determining if the statement, or its implication, is actionable under the "verifiability test" announced by this Court in Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990).

3. Whether a statement broadcast during an investigative television news report on a regularly scheduled news program that a private business' product is "unnecessary -- certainly not worth paying for" is "inherently subjective" and does not contain or imply a verifiable factual assertion so that the statement, or its implication, is protected against a libel claim by the First Amendment to the United States Constitution under the "verifiability test" announced by this Court in Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990).

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

THE LIVING WILL CENTER, a limited liability company, and MERRILL G. HASTINGS, JR., *Petitioners,*

v.

NBC SUBSIDIARY (KCNC-TV), INC. and SUZANNE McCARROLL, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

The Living Will Center and Merrill G. Hastings, Jr. respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Colorado in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Colorado (App., *infra*, 1-a) is reported at 879 P.2d 6 (Colo. 1994). The opinion of the Colorado Court of Appeals (App., *infra*, 35-a) is reported at 857 P.2d 514 (Colo. App. 1993). The opinion of the District Court of Jefferson County, Colorado (App., *infra*, 66-a) is unreported.

JURISDICTION

The Supreme Court of Colorado, en banc, entered its judgment on July 11, 1994 (App., *infra*, 1-a). A motion for rehearing was timely filed and was denied by the Supreme Court of Colorado on September 6, 1994 (App., *infra*, 85-a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

This case involves issues concerning the First Amendment to the Constitution of the United States: "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . . ."

STATEMENT

Petitioners sued NBC Subsidiary (KCNC-TV), Inc., a television station, and its employee, reporter Suzanne McCarroll (Respondents), in the District Court of Jefferson County, Colorado. Petitioners alleged that Respondents' newscast contained defamatory statements concerning the business conduct of The Living Will Center, one of the Petitioners. The District Court of Jefferson County, Colorado, granted Respondents' motion to dismiss, finding the Respondents' newscast to be constitutionally privileged under the First Amendment of the United States Constitution and not actionable in a suit for defamation. The Colorado Court of Appeals reversed the trial court in a two-to-one decision, concluding that terms used in the newscast, when considered in the context of the broadcast as a whole, implied material assertions of fact susceptible to being proved false, and, therefore, the broadcast was not constitutionally privileged. The Supreme Court of Colorado reversed the Colorado Court of Appeals' ruling, in a four-to-three decision, holding that the broadcast statements neither contained nor implied a verifiable fact and could not reasonably be understood as assertions of fact, and, therefore, the newscasts were privileged under the First Amendment to the United States Constitution.

A. FACTS

The Living Will Center was capitalized at $200,000 on January 15, 1991, and eleven employees began telemarketing its products and services on April 7, 1991 with a $60,000 advertising campaign in the Denver metro market utilizing local newspapers, direct mail, radio and television, including a series of sixteen (16) one-minute commercials on Respondent KCNC-TV. Petitioners sell for $29.95 a combination of four products and two services related to the Colorado Living Will and other advance medical directives:

1. A Colorado Living Will form;
2. A Durable Power of Attorney for Health Care form;
3. An Advance Medical Directive form;
4. A Personal ID Card, which replicates in miniature an individual's Colorado Living Will, along with other health care information;
5. Services of a Central Registry; and
6. A subscription to a quarterly newsletter about the right-to-die issue, living wills, and related documents.

The Living Will Center brought this action as a result of two successive news telecasts about the Living Will Center and advance medical directives aired by KCNC-TV on its weekday 4:00 p.m. news program on April 23 and 24, 1991.[1] The first newscast included a statement by Dr.

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[1]The entire text of the two broadcasts is set out as an appendix to the opinion of the Colorado Court of Appeals, Living Will Center v. NBC Subsidiary, 857 P.2d 514, 521 (Colo. App. 1993) (App., *infra*, 53-a).

Frank Marsh, who was presented as a "medical ethicist." He stated, "I think it's a scam." Suzanne McCarroll, the investigative reporter, stated: "He says the medical directive and power of attorney forms are unnecessary -- certainly not worth paying for." Dr. Marsh further stated: ". . . they will send in $29.95 and what they get back is they've been taken -- is what it amounts to -- totally taken." Within 24 hours of the first newscast, Petitioner's daily dollar sales volume plummeted 65% and never recovered.

B. PROCEEDINGS BELOW

Petitioners brought this action in the District Court for the County of Jefferson, State of Colorado, for damages arising out of the television newscasts aired by Respondents. The Respondents filed a motion to dismiss Petitioners' complaint on the grounds that the complaint failed to state a claim upon which relief could be granted. The District Court treated Respondents' motion to dismiss as a motion for summary judgment and entered judgment in favor of Respondents holding that: (a) the substance and gist of the television newscasts is not false; and (b) the statements made by Dr. Marsh are nonactionable opinion under federal law amounting to rhetorical hyperbole and supported by disclosed truthful facts.

On appeal, the Colorado Court of Appeals, in a two-to-one decision, held that Respondents' newscasts implied material assertions of fact capable of verification and thus, the newscasts were not constitutionally privileged speech in an action for defamation. Therefore, the Court of Appeals

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These facts are not in dispute.

reversed the judgment dismissing Petitioners' complaint and remanded with directions.

Respondents petitioned the Supreme Court of Colorado for a writ of certiorari to review the opinion of the Court of Appeals. The Supreme Court of Colorado granted certiorari to determine: (a) whether the Court of Appeals holding is in accord with the applicable precedent of the United States Supreme Court and the Supreme Court of Colorado; and (b) whether the Court of Appeals erred in failing to review the District Court's determination that the substance and gist of the newscasts was true and if so, if that determination was correct.

The Supreme Court of Colorado, in a four-to-three decision, held that the statements in the television newscast are constitutionally privileged since the terms "scam" and "taken" neither contain nor imply a verifiable fact, nor can they reasonably be understood as an assertion of actual fact. Because the Supreme Court of Colorado concluded that the statements in the April 23, 1991 broadcast did not contain or imply verifiable facts, it held that it need not address the second issue for which it granted certiorari, because the truth of the implication of the television newscast cannot be determined. Therefore, the Supreme Court of Colorado reversed the Court of Appeals and remanded the case to that court to reinstate the entry of judgment in favor of Respondents. Three justices dissented and would have affirmed the Colorado Court of Appeals. The Petitioners filed a motion for rehearing which was denied by the Supreme Court of Colorado.

HOW THE FEDERAL QUESTION WAS PRESENTED

The federal question for which Petitioners seek review is whether the Supreme Court of Colorado's ruling is in accord with this Court's decision in Milkovich v. Lorain Journal Co., 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990); specifically, whether the statements in Respondents' television newscast and the implications from those statements contain a verifiable fact or can reasonably be understood as an assertion of fact, whereby the statements and implications would not be privileged under the First Amendment to the United States Constitution.

The applicability of Milkovich was raised in the first instance in the Respondents' Memorandum Brief in Support of its Motion to Dismiss at the trial court level. The applicability of Milkovich was ruled on by the trial court. (App., *infra.*, 82-a) The trial court held that the statements made by Dr. Marsh in the broadcast were rhetorical hyperbole, protected opinion, not assertions of fact, and therefore were not actionable for defamation under Milkovich and the First Amendment to the U.S. Constitution. (App., *infra.*, 82-a).

The application of Milkovich was next raised in both parties' briefs to the Colorado Court of Appeals. The Colorado Court of Appeals ruled on the application of Milkovich in holding that the broadcasts were actionable under the Milkovich "verifiability test" because they contained or implied provably false facts. (App., *infra.*, 46-a).

The Supreme Court of Colorado granted certiorari specifically to consider the federal question, "whether that holding [Colorado Court of Appeals] is in accord with the

applicable precedent of the United States Supreme Court and this court . . ." The applicability of Milkovich was subsequently raised in the Supreme Court of Colorado proceedings in both parties' briefs. The Supreme Court of Colorado concluded that under Milkovich the television newscast did not contain or imply a verifiable assertion of fact nor could it reasonably be understood as an assertion of actual fact, making the television newscast privileged under the First Amendment to the Constitution of the United States. (App., *infra.*, 24-a).

REASONS FOR GRANTING THE PETITION

This Court's decision in Milkovich v. Lorain Journal Co., supra, has led to confusion and conflicting decisions in federal circuits and the highest state courts. The Supreme Court of Colorado's decision is a prime example of this confusion and is a timely opportunity for this Court to clarify the "enigmatic"[2] aspects of the Milkovich decision. The decision is in error because it makes an incorrect application of the principles in Milkovich, and thereby conflicts with decisions of the United States Court of Appeals and other state courts of last resort.

I. THE SUPREME COURT OF COLORADO'S INTERPRETATION OF MILKOVICH IS CONTRARY TO THE HOLDING IN MILKOVICH, CONFLICTS WITH DECISIONS OF THE FEDERAL CIRCUITS AND THE ILLINOIS

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[2]R. SMOLLA, LAW OF DEFAMATION, (Page 6-4, Release #7, January 1994) ("The already complex body of law surrounding the fact/opinion distinction was made significantly more enigmatic in the summer of 1990 with the Supreme Court's ruling in Milkovich v. Lorain Journal Company.")

SUPREME COURT, AND FAILS TO TAKE INTO ACCOUNT THE "HARD NEWS" CONTEXT OF THE BROADCAST.

In the Living Will Center, the Supreme Court of Colorado held that statements made on a television news broadcast calling the Living Will Center "a scam" and stating that its customers were being "taken . . . totally taken" are merely rhetorical hyperbole, and that the substance of the broadcast was that the Living Will Center's products were not a good value at a price of $29.95. The rationale for the decision was that the terms "scam" and "taken" are merely rhetorical hyperbole or imaginative expression and therefore not provably false under the verifiability test announced in Milkovich. No analysis was made of the social context of the statements, i.e., whether a viewer would expect rhetorical hyperbole in the context of a daily "hard news" broadcast.

The Milkovich decision holds that, under constitutional law, statements on matters of public concern, where media defendants were involved, must be provable as false to be actionable.[3] The Court went on to state:

> Next, the Bresler-Letter Carriers-Falwell line of cases provides protection for statements that cannot "reasonably [be] interpreted as stating actual facts" about an individual. This provides assurance that public debate will not suffer for lack of "imaginative expression" or the "rhetorical

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[3]110 S.Ct. at 2706.

> hyperbole" which has traditionally added much to the discourse of our Nation.[4]

Thus, the Milkovich case announced a two-part test for actionable libel: the statement or its implications must be provably false, and the statement must reasonably be interpreted as stating actual facts about the plaintiff. This test is referred to in this petition as the "verifiability test."

The social context of the defamatory statements in the Living Will Center was a regularly scheduled television newscast. The assertions in the broadcast that the Living Will Center was "a scam," and that its customers were being "taken," were not in a context where a television viewer would recognize them as hyperbole, imaginative expression or one's subjective opinion. Daily television newscasts are the quintessential medium where one expects assertions of fact. The average viewer of television newscasts expects to be factually informed of actual events, not to receive imaginative expressions of opinion.[5] The opposite extreme,

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[4]Id. (Citations omitted).

[5]See, e.g., Sunshine Sportswear & Electronics, Inc. v. WSOL Television, Inc., 738 F. Supp. 1499, 1506 (D. S.C. 1989) (Holding that the term "scam" can be identified as either true or false, the court stated, "Finally, when the statements are examined in the broader social context, it is apparent that the viewer is not made aware that the defendants' statements regarding the plaintiffs are protected opinions. To the contrary, the broadcast appears to be an investigative television news report meant to relay factual information to the audience."); Moldea v. New York Times Co., 22 F.3d 310, 313 (D.C. Cir. 1994) (contrasting context of book review with "a hard news story"); Spence v. Flynt, 816 P.2d 771 (Wyo. 1991) cert. denied, 112 S.Ct. 1668 (1992) (Justice Golden's dissent contrasts Hustler magazine article, "akin to an editorial opinion page", with "hard news"); Phantom Touring, Inc. v. Affiliated Publications, 953 F.2d 724, 729 (1st Cir. 1992) cert. denied, 112 S.Ct.

where persons expect expressions of opinion are forums such as book reviews, op-ed pages, editorials, letters to the editor, talk shows, entertainment columns and the like.[6]

The confusion as to the proper interpretation of Milkovich and the importance of "social context" has gone so far that one court, the United States Court of Appeals for the District of Columbia Circuit, has even reversed itself on the issue. In Moldea v. New York Times Company, 15 F.3d 1137 (D.C. Cir. 1994) ("Moldea I"), the District of Columbia Circuit held that the Milkovich decision mandated that the broad social context of the allegedly defamatory statement--a book review appearing in the New York Times--should not be considered in determining if statements made in the book review are actionable.[7] The court in Moldea I

2942 (1992) (contrasting theater critic's column with news reports, the court stated, "The nonfactual nature of [the theatre critic's column] is indicated at first glance by the format . . . [which] appeared as a regularly run theatre column, a type of article generally known to contain more opinionated writing than the typical news report.").

[6]See, e.g., Moldea I, supra (book review); Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984) (en banc), cert. denied, 105 S.Ct. 2662 (1985) (op-ed page); Neish v. Beaver Newspapers, Inc., 398 Pa.Super. 588, 581 A.2d 619 (1990) (editorial); Shiver v. Apalachee Publishing Co., 425 So.2d 1173 (Fla. Dist. Ct. App. 1983) (letters to the editor); National Association of Government Employees v. Central Broadcasting Corp., 379 Mass. 220, 396 N.E.2d 996 (1979), cert. denied, 446 U.S. 935 (1980) (talk show); Phantom Touring, Inc. v. Affiliated Publications, supra (newspaper theatre critic's column); Mashburn v. Collin, 355 So.2d 879 (La. 1977) (restaurant review).

[7]See, SMOLLA, LAW OF DEFAMATION; (Release #8 11/94, p. 6-71) (". . . the Court in Moldea I agreed that the context in which the statements were made--the genre of a book review--had no meaningful place in the analysis of whether the statements were factual or

ruled that Milkovich had removed the contextual test developed in Ollman v. Evans[8] and other cases, stating, "our analysis of this case is not altered by the fact that the challenged statements appeared in a book review rather than in a hard news story." Moldea I, 15 F.3d at 1145-46. Later, the court reversed its earlier decision and held that the context of the defamatory statement was important and that Milkovich did not "disavow" the importance of context, but simply "discounted it in the circumstances of that case."[9] The court in Moldea II stated,

> After careful consideration of the Times' petition for rehearing and Moldea's response to that petition, we are persuaded to amend our earlier decision. The original majority opinion was generally correct in it statement of the law of defamation. Unfortunately, that opinion failed to take sufficient account of the fact that the statements at issue appeared in the context of a book review, a genre in which readers expect to find spirited critiques of literary works that they understand to be the reviewer's description and assessment of text that are capable of a number of possible rational interpretations. While there is no per se exemption from defamation for book reviews, our initial resolution of this case

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nonfactual." emphasis in original).

[8]Ollman v. Evans, supra.

[9]Moldea v. New York Times, 22 F.3d 310 (D.C. Cir. 1994) ("Moldea II").

> applied an inappropriate standard to judge whether the Times review was actionable.[10]

Moldea II analyzed prior U.S. Supreme Court precedent and concluded that it is necessary to analyze the context of a defamatory statement because it is the setting which helps determine whether the meaning of a statement is received literally, or figuratively as rhetorical hyperbole.

> . . . Both Bresler and Letter Carriers rely in large part on the notion that the speech at issue in each case was intended as hyperbole, see Milkovich, 497 U.S. at 20; however, this fact reinforces the importance of context, because it is in part the settings of the speech in question that makes their hyperbolic nature apparent, and which helps determine the way in which the intended audience will receive them. Thus, the "lusty and imaginative expression of the contempt felt by union members" for a "scab" may lawfully find hyperbolic expression during a strike, Letter Carriers, 418 U.S. at 286, because the context assures that no reader could understand the epithet "traitor" to be a charge that the "scab" has committed the criminal offense of treason.[11]

The confusion surrounding whether Milkovich discounted or removed entirely the significance of social context in verifiability analysis is apparent in the Living Will Center

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[10]Id. at 311.

[11]Id. at 314.

decision. The Supreme Court of Colorado decision remains in conflict with the holding in Moldea II because the Supreme Court of Colorado, like the court in Moldea I, failed to take account of the social context of the statements.

The Supreme Court of Colorado's decision in the Living Will Center did not analyze the issue of the social context in which the defamatory statements occurred nor what the average viewer's expectations were.[12] The decision focused almost exclusively on the factual versus nonfactual standard set out in Milkovich and the more narrow "context" of the statements within the broadcasts as a whole. This was a significant error brought on, in part, by the confusion generated by Milkovich. As one commentator notes in analyzing Moldea II, ". . . in determining whether or not a statement is "factual," one simply must take context into account."[13]

The Supreme Court of Colorado's decision is in error because its failure to analyze the social context of the broadcasts led it to a mistaken result in holding that the statements in the April 23, 1991 newscast are not actionable under Milkovich.

The Living Will Center decision also held that Dr. Marsh's statements were "opinion" based on facts disclosed to the viewer and were thus nonactionable under the "pure"

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[12]Although the Colorado Supreme Court did discuss the "medium" through which a defamatory statement is disseminated in its summary of defamation law, 879 P.2d at 9, it did not consider or analyze the hard news context of the broadcasts in determining what was the viewers' reasonable understanding of the newscasts, including the terms "scam" and "taken."

[13] R. SMOLLA, at 6-80

vs. "mixed opinion" analysis of the Restatement (Second) of Torts, § 566 (1977). The Supreme Court of Colorado interpreted Milkovich as providing protection from defamatory statements whose factual premises are revealed.[14] The application of this principle in the Living Will Center decision is in error, because if the premise that nothing in the newscasts "even remotely suggests that LWC is committing the crime of fraud or that it is engaged in a deceptive commercial practice"[15] is true, a conclusion that the Living Will Center is engaged in "a scam," i.e., a "fraudulent or deceptive act or operation", would be either factually unsupported or an erroneous assessment of the facts and therefore actionable under the Restatement analysis.

> Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact.[16]

The decision of the Supreme Court of Colorado that the term "scam" cannot reasonably be understood as stating an actual fact because it is rhetorical hyperbole is directly in conflict with Kolegas v. Heftel Broadcasting Corp., 607 N.E.2d 201 (Ill. 1992). In Kolegas, the Illinois Supreme Court ruled that a statement broadcast by two radio station talk show hosts that Kolegas was "scamming" them was

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[14]NBC Subsidiary v. Living Will Center, 879 P.2d at 12.

[15]Id. at 12.

[16]Milkovich, supra, 110 S.Ct. 2695, at 2706 .

capable of being interpreted as an assertion of fact and that the listening audience could conceivably take the comment as serious, even though the defendant argued that the comments were harmless jokes. The Illinois Court ruled that whether the comment was understood as a joke was a triable issue of fact.[17]

The conflicting decisions in Living Will Center, Kolegas, Moldea I and Moldea II call out for guidance from the Supreme Court of the United States on how a court should, in a principled way, determine whether a statement will be received by an audience as rhetorical hyperbole and imaginative expression. If defamatory statements during a daily newscast like "scam" and "taken . . . totally taken" in the context of a hard news story about a local business can be held non-actionable by a state supreme court simply by labeling the statements as rhetorical hyperbole, without any regard to the social context of those statements, decisions in this area will continue to be completely unpredictable and the outcome of libel actions involving defamatory statements, which might be arbitrarily characterized as "rhetorical hyperbole", will be like a lottery: a matter of the luck of the draw.

II. THE SUPREME COURT OF COLORADO'S HOLDING THAT THE WORTH OF A GIVEN

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[17]The Supreme Court of Colorado's decision in the Living Will Center is also inconsistent with the Supreme Court of Arkansas' finding in Waymire v. DeHaven, 858 S.W.2d 69 (Ark. 1993). The Supreme Court of Arkansas cited Webster's Ninth New Collegiate Dictionary (1986) as defining "scam" as "a fraudulent or deceptive act or operation," and the court held that the "easily ascertainable meaning" of the term was capable of impugning the plaintiff's business reputation.

PRODUCT IS INHERENTLY SUBJECTIVE IS A MISTAKEN INTERPRETATION OF MILKOVICH.

The Supreme Court of Colorado stated in the Living Will Center decision,

> Clearly this implication [that the Living Will Center's product is not worth $29.95] is not a verifiable fact. The worth of a given service or product is an inherently subjective measure which turns on myriad considerations and necessarily subjective economic, aesthetic, and personal judgments.
>
> * * *
>
> As such, we conclude that the truth of this implication need not and cannot be determined. The implication of the two broadcasts is not verifiable and thus, that implication is constitutionally privileged.[18]

This holding, that the worth of a product is "inherently subjective" and not verifiable, is a grave misinterpretation of the Milkovich decision and has adverse implications for business everywhere. If every statement regarding a product's worth is subjective and therefore not actionable, then businesses have no protection against any damaging, highly defamatory statements about the worth of their products. This result cannot be a correct application of the Milkovich test of verifiability.

Other federal courts have found that statements of a product's worth are actionable under Milkovich. In United States Medical Corp. v. M.D. Buyline, Inc., 753 F.Supp.

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[18]879 P.2d at 14.

676 (S.D. Ohio 1990), a medical equipment newsletter contained statements that the plaintiff, a vendor of medical laser equipment and related supplies, "consistently gouges customers on price and service". Id. at 677. Following Milkovich, the court held that the statement that plaintiff overcharged customers was provable as false in that the plaintiff may be able to verify objectively that it did not overcharge customers or gouge them in any other manner. Id. at 679-80. The court also stated that the statement cannot be dismissed as mere "rhetorical hyperbole" having no basis in fact.

III. THE QUESTIONS PRESENTED ARE IMPORTANT.

If allowed to stand, the Living Will Center decision would have a chilling effect on the ability of businesses to protect their reputations and products from materially false assertions of fact. The Living Will Center ruling stands for the proposition that a television station can effectively destroy a business during a newscast by using terms that have an ascertainable meaning of fraud and deception, but the broadcaster can escape any accountability by simply characterizing the terms as rhetorical hyperbole. Also, the holding that the worth of a given product is "inherently subjective" and therefore not verifiable could be used by the media to escape accountability for highly damaging false statements about a business' product.

In this age where there is great competition among the electronic media, strong pressure exists to sensationalize news stories, and more and more false reports will occur. This case is an opportunity for the Court to articulate for the lower courts the principles of accountability for defamatory

statements that Milkovich intended, but which are now being misapplied by some lower courts.

While it is important for the media to inform the public of telemarketing scams and other fraudulent schemes, it is also imperative that honest businesses not be denied the opportunity to rebut, through a libel action, false assertions of fraud and deceptive practices. The breathing space for free and sometimes offensive expression, which rightfully enjoys a privileged status under the First Amendment to the United States Constitution, does not require that a direct attack on a business' reputation for honesty and integrity be endured without recourse. The delicate balance recognized in Milkovich between the guarantee of free discussion of public issues and the strong societal interest in redressing attacks on reputation has been upset by the Living Will Center decision.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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